

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

SEP 14 11 41 AM '99

USP

In the Matter of	)	
	)	
JAMES A. KAY, JR.	)	WT DOCKET NO. 94-147
	)	
Licensee of One Hundred Fifty Two Part 90	)	
Licenses in the Los Angeles, California Area	)	

Appearances

Robert J. Keller and Aaron Shainis, on behalf of James A. Kay, Jr.; and William H. Knowles-Kellett and John J. Schauble, on behalf of the Wireless Telecommunications Bureau.

INITIAL DECISION  
OF  
CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: September 7, 1999

Released: September 10, 1999

Preliminary Statement

1. James A. Kay, Jr. (Kay), is the licensee of 152 stations in the greater Los Angeles area. WTB Ex. 290. By Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing for Forfeiture, 10 FCC Rcd 2062 (released December 13, 1994) (Show Cause Order), the Commission commenced the instant proceeding to determine ultimately whether the licenses for these stations should be revoked.<sup>1</sup>

2. The Show Cause Order in this case designated eight issues, located at subparagraphs 10(a) through 10(h), for resolution by the Presiding Administrative Law Judge:

- (a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries;

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<sup>1</sup> The original caption in the HDO specified one hundred sixty-four Party 90 licenses. Attachment A to the HDO set forth a list of the 164 subject call signs. In addition to stations licensed to Kay or to companies owned by him, this list also included one authorization held by Multiple M Enterprises, Inc., HDO, Attachment A, item 153, and eleven authorizations held by Marc Sobel. HDO, Attachment A, items 154-164. In May 1996, the Commission modified the HDO by deleting the facilities licensed to MME and Sobel and by changing the caption to specify one hundred fifty two Part 90 licenses. Order (FCC 96-200), 11 FCC Rcd 5324 (1996).

- (b) To determine whether James A. Kay, Jr. has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's Rules;
- (c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.115, 90.157, 90.313, 90.623, 90.627, 90.631, and 990.633 of the Commission's Rules;
- (d) To determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;
- (e) To determine whether James A. Kay, Jr. willfully or maliciously interfered with the radio communications of other systems, in violation of Sections 333 of the Act;
- (f) To determine whether James A. Kay Jr. has abused the Commission's processes in order to obtain cancellation of other licenses;
- (g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James a. Kay, Jr. is qualified to remain a Commission licensee;
- (h) To determine if any of James A. Kay, Jr.'s licenses have automatically cancelled as a result of violations listed in subparagraph (c) pursuant to Sections 90.155, 90.157, 90.631 or 90.633 of the Commission's rules; and [sic]

10 FCC Rcd at 2064-65.

3. On May 31, 1966, Judge Sippel, the Presiding Judge, issued a summary decision whereby he, inter alia, disqualified Kay and revoked all of his Title III authorizations. Summary Decision of Administrative Law Judge Richard L. Sippel, 11 FCC Rcd 6585 (1996). Kay appealed this ruling, and its effectiveness was automatically stayed pursuant to Section 1.276(d) of the Commission's Rules. 47 C.F.R. § 1.276(d). In February 1997 the Commission reversed the summary decision and remanded the case for hearing. James A. Kay, Jr., 12 FCC Rcd 2898 (OGC 1997)..

4. By Memorandum Opinion and Order, FCC 98M-94 (released July 15, 1998), issues (b) and (f) were resolved in Kay's favor by summary decision. Similarly issue (d), with respect to Sections 90.629, and 90.627, was resolved in Kay's favor. Id. The order notes that the reference to Section 90.629 of the Commission's Rules should have been to 90.627. Id. (Section 90.627 of the Commission's Rules is still properly the subject of subparagraph 10(c)).

5. By Memorandum Opinion and Order, FCC 98M-15 (released February 2, 1998), the Presiding Judge added the following issues:

To determine, based on the findings and conclusions of Initial Decision FCC 97D-13 reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in presenting a Motion To Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995, and January 25, 1995.

To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

6. By Order, FCC 98-274 (released October 19, 1998), the Commission ordered the appointment of a new Administrative Law Judge to preside over this case. By Order, FCC 98M-122 (released October 30, 1998), Chief Judge Joseph Chachkin appointed himself to preside over the proceeding. The evidentiary admissions session was held on November 30, 1998. Hearing sessions were held in Washington, D.C., on December 21, 22, 23, 28, 29, and 30, 1998; and January 11, 12, 13, 14, 19, and 20, 1999. The record in this proceeding was closed on January 20, 1999. Tr. 2565. Proposed findings were filed by the parties on May 10, 1999. Replies were filed on June 1, 1999.

7. In accordance with the requirements of Section 312 of the Communications Act of 1934, as amended, (the "Act") and paragraph 15 of the Show Cause Order, the Wireless Telecommunications Bureau (the "Bureau") has the burden of proceeding with the introduction of evidence and the burden of proof with respect to all issues.

### **Findings of Fact**

#### **General Background**

8. Kay operates Part 90 land mobile radio facilities in the Los Angeles, California, area. He has been involved in the radio field since approximately 1972 or 1973. Tr. 859. He began providing two-way mobile service to others on a commercial basis in approximately 1982 to 1984. Tr. 859-860. He is the President and sole shareholder of Buddy Corp., which operates under the fictitious business name of Southland Communications. Southland is engaged primarily in the sales, service, installation, and maintenance of mobile radios and two-way mobile radios systems. He also operates a sole proprietorship under the name of Lucky's Two-Way Radio. Lucky's sells repeater service, rents repeater site space, and provides technical consulting services. Tr. 861.

9. Lucky's provides repeater service, i.e., commercial mobile radio service to end users, and Southland does equipment sales, leasing, installation, and maintenance. Tr. 862. While many customers obtain their equipment from Southland and their repeater service from Lucky's, not all do. A customer might obtain radios from a source other than Southland, but obtain repeater service from Lucky's. Similarly, a customer might obtain radios from Southland, but use them with a repeater service obtained from a source other than Kay. Tr. 863. Both Lucky's and Southland are located in the same building, Kay's shop in Van Nuys. Tr. 2271.

### Section 308(b) Issue

#### The Initial Section 308(b) Correspondence

10. By letter dated January 31, 1994, and directed to Kay, the Bureau requested various information pursuant to Section 308(b) of the Communications Act. WTB Ex. 1. This letter (hereinafter referred to as the "308(b) Request") stated: "The Commission has received complaints questioning the construction and operational status of a number of your licensed facilities.... The complaints allege that the licensed loading of your facilities does not realistically represent the actual loading of the facilities, thereby resulting in the warehousing of spectrum." WTB Ex. 1 at p. 1 (underlining in original). Neither the identity of the complainants nor the specifics of any alleged complaint was disclosed. Id.

11. The 308(b) Request directed Kay to produce a list of all Kay's customers, including "the user name, business address and phone number, and a contact person." WTB Ex. 1 at p. 2. It also sought complete details regarding the technical configuration of Kay's systems and the operations of Kay's customers, including the number of mobile units and control stations operated by each user and the number of units operated on each of Kay's stations. Id. In addition, the 308(b) Request asked for an alphabetical list of the call signs and licensee names for all facilities owned or operated by Kay or any companies through which he does business; <sup>2</sup> annotated to show what facilities are located on U.S. Forest Service land; the original license grant date for each station and the date the facility was constructed and placed into operation; copies of all U.S. Forest Service permits; <sup>3</sup> and an explanation for the lack of a U.S. Forest Service permit for any station located on U.S. Forest Service land. Id. at p. 1.

12. Kay received the letter shortly after January 31, 1994, only two weeks after the Northridge earthquake that had done extensive damage to his business and his residence. Tr. 2340-2341. He read it and he understood that it was asking him to provide the specified

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<sup>2</sup> The Bureau conceded at the hearing that it could have easily obtained from its own files the call signs and licenses issued to Kay and limited its inquiry to companies through which Kay does business. (See Tr. 2350-2354).

<sup>3</sup> The Bureau asserted at a prehearing conference that it needed Kay's copies of the permits to compare them with copies obtained from the U.S. Forest Service. Tr. 175. Contrary to this assertion, the Bureau never obtained copies from the U.S. Forest Service, Tr. 2091-2108, and relied solely on Kay's copies.

information. Tr. 865. Kay believed it would have been virtually impossible to have supplied the requested information at that time, partly because his business had been severely damaged by the Northridge earthquake that had occurred less than two weeks prior to the 308(b) Request, Tr. 2340-2341, and also because "[t]he request was so massive, it was impossible to deal with." Tr. 2342. Later, in response to discovery requests, Kay produced virtually all of the same information requested in the 308(b) Request. The task required more than three of his staff to devote almost three months to nothing but this project, and it also required 40 to 60 hours of his personal time to compile the information. And this was all done in 1995, after he had "more or less" put the company back together after the earthquake. Kay ultimately produced over 36,000 documents to the Bureau in discovery, and he estimates that only 2,000 to 4,000 documents less would have been required to comply with the 308(b) Request. Tr. 2355. Kay stated that during the weeks and months following the earthquake, it would have been literally impossible to have complied with the Section 308(b) Request, because he had no staff, no personal availability, and everything was in total disarray. Tr. 2355-2356.

13. When Kay received the Section 308(b) letter, he faxed it to his Washington, D.C. communications law firm, Brown & Schwaninger, to assist him in responding to the Section 308(b) letter. Brown & Schwaninger had represented Kay on FCC-related matters since the late 1980's and continued to do so until approximately mid-1995. Tr. 866, 2339. Kay instructed Brown to review and prepare a response to the letter. Tr. 2339.

14. The 308(b) Request was the first in a series of letters exchanged between the Bureau and Brown & Schwaninger.<sup>4</sup> The initial 308(b) Request was in a letter, dated January 31, 1994, from the Bureau, addressed to Kay, and indicating delivery via both regular mail and certified mail -- return receipt requested. WTB Ex. 1.

15. Dennis C. Brown, a partner at Brown & Schwaninger, responded with a letter, dated February 16, 1994, in which he specifically sought "written assurance that any information which Kay submits... will be held in strictest confidence and will not be disclosed under any circumstances to any person who is not a Commission employee." WTB Ex. 348 at p. 1. Brown further requested that Kay be afforded immunity from any forfeiture action or criminal prosecution based on any information supplied, and asked that the running of the sixty day response period be tolled pending action on the requests set forth in the letter. *Id.* at p. 2. Kay received a copy of this letter on or shortly after February 16, 1994, but did not recall whether he saw an advance draft of it. Kay stated that upon receipt of the letter he would have read or scanned through it. Tr. 1027. Kay did not recall whether he was specifically aware that his attorneys were making the request for immunity, but "conclude[d] that my attorneys were acting in an abundance of caution on my behalf." Tr. 1028.

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<sup>4</sup> Most of the Bureau's letters after the initial request were addressed to Dennis C Brown, Esquire, of Brown & Schwaninger, but in three instances (see WTB Ex. 4 and Kay Exs. 49 & 54) the Bureau wrote directly to Kay.

16. The Bureau responded with a letter, dated March 1, 1994, addressed to Brown. WTB Ex. 349. The Bureau stated that if Kay wished to have submitted material withheld from public inspection he would be required to submit such a request concurrently with the submission of the materials. The Bureau further stated that Brown's February 16, 1994, letter "is not considered a request that information submitted... be withheld from public scrutiny." *Id.* at p. 1. The request for immunity was summarily denied on the stated grounds that "Congress has not provided for immunity when responding to [Section 308(b)] requests." *Id.* The deadline for responding to the 308(b) Request was extended to April 14, 1994. *Id.* at p. 2. Kay considered this letter to be essentially a denial of his request for confidentiality. Tr. 1029.

17. On April 7, 1994, Brown wrote two letters to the Bureau. In the first letter (WTB Ex. 2), Brown specifically requested confidential treatment pursuant to Section 0.459 of the Commission's Rules. Brown sought confidential treatment to prevent an unwarranted invasion of privacy in that Kay was submitting (via Brown's second April 7 letter) personal information. WTB Ex. 2 at pp. 1-2. Brown also requested confidentiality on competitive grounds. The letter specifically advised the Bureau as follows:

Mr. Kay has learned that some of his competitors have obtained copies of the [308(b) Request] and have already made competitive use of the fact of the request to disparage his reputation in the radio communications service market. Affiliates of some of Mr. Kay's competitors have informed him that his competitors intend to obtain the information which he is submitting and distribute it in the Los Angeles area in an effort to disparage him among his customers. Mr. Kay is also reliably informed that some of his competitors intend to use the information to probe for weaknesses, if any, in his business strategy, and to solicit his current customers directly.

WTB Ex. 2 at p. 2.

18. In the second letter dated April 7, 1994 (WTB Ex. 3), Brown addressed the substance of the 308(b) Request. He presented a number of legal objections and challenges to the scope of the request and the Bureau's statutory right to seek the requested information. As to some of the requested information, Brown informed the Bureau that it already had the requested information or that Kay was not required to maintain the requested information. For example, the Bureau obviously already knew the call signs of the stations licensed to Kay as well as the dates the licenses were granted. WTB Ex. 3 at pp. 1-2. Brown challenged the Commission's jurisdiction to inquire into the status of Kay's U.S. Forest Service Permits, and he also explained that, under USFS procedures, the lack of permit as to a particular facility was not probative evidence of non-construction as the Bureau's Section 308(b) letter "presumed." *Id.* at pp. 3-4.

19. As to the specific requests for loading information, Brown stated that the request "is not sufficiently specific for [Kay] to supply the requested information." It was explained that the loading of Kay's systems fluctuates over time, from hour to hour, day to day, and season to season. *Id.* at p. 5. Brown also noted that Commission regulations in effect at the time did not require Kay to know the loading at a given point in time, but rather only when he made certain

requests, e.g., requests to add channels or renew facilities where the issuance of the requested authorization is subject to a certain level of loading. Id. at p. 6. Brown further stated that Kay had already provided the Commission with the loading information for his 800 MHz stations after the complaints alluded to the 308(b) Request had been filed. Id.

20. Brown's second April 7 letter also expressed grave concerns about the scope of the 308(b) Request. Brown noted that the Bureau "essentially requests that Mr. Kay tell the Commission everything about everything." He went on to state that the "request is unduly and unreasonably burdensome in light of the local conditions of the Los Angeles market." In this connection he expressly advised the Bureau that "Kay is still spending a substantial part of each day recovering from the Northridge earthquake of earlier this year." Id. at p. 6.

21. Brown considered that Kay had discharged his statutory obligation under Section 308(b). Indeed, Brown expressly stated:

By submission of the foregoing, Mr. Kay avers that he has fulfilled his obligation in accord with 47 C.F.R. §308(b) by substantively responding to the Commission's letter of inquiry in all respects, including the exercise of his right to decline an invitation to provide information when the request is outside the scope of the law. Mr. Kay stands ready to cooperate with the Commission in all respects which are reasonable calculated to forward the legitimate exercise of the Commission's authority in the fulfillment of its statutory duties. Accordingly, nothing contained herein should be deemed to be a failure by Mr. Kay to comply with all requirements of law.

WTB Ex. 3 at p. 6.

22. Kay received copies of and scanned through two letters sent by Brown & Schwaninger to the Bureau, both dated April 7, 1994 (WTB Exs. 2 & 3). Tr. 2341, 2343. He did not read them carefully, word for word, because he was, during that period, extremely busy dealing with the aftermath of the Northridge earthquake that had occurred on January 17, 1994. During this time Kay was devoting an inordinate amount of time to earthquake recovery, assisting customers, meeting his financial obligations--all while coping with the aftershocks that continued for some six months following the main earthquake. Tr. 2343-2344. Similarly, Kay did not review word for word, nor did he carefully analyze, the Bureau's May 20, 1994 letter to Brown (WTB Ex. 6). Tr. 2356-2357. As Kay explained, while he was in the midst of recovering from the devastating earthquake, he "had assigned the task to [his] attorneys to deal with the Commission, to explain to them the situation we were in, and they were responding to it." Tr. 2357.

Kay's Concerns Regarding Confidentiality

23. Both Kay and his legal counsel had considered the Bureau's March 1, 1994, letter (WTB Ex. 349), a denial of Kay's request for confidentiality, Tr. 1028-1029; WTB Ex. 3 at p. 5. Although the Bureau held open the possibility that Kay could submit a formal request for confidentiality pursuant to Section 0.459 of the Rules, Kay understood that this request would have to be accompanied by the very materials he was seeking to keep confidential. Tr. 1029-1030. He was very much concerned about a process that required him to submit all the documents and then have the Bureau staff make an after-the-fact determination as to which documents would be publicly released. Tr. 1030-1031.<sup>5</sup> Accordingly, both of the April 7, 1994, letters included copyright notices across the bottom of each page, stating as follows: "Entire contents copyright, James A. Kay, Jr. 1994. All right reserved. No portion of this document may be copied or reproduced by any means." WTB Exs. 2&3.

24. On May 11, 1994, a month after Brown's April 7 letters containing the copyright notice, the Bureau wrote a letter directly to Kay stating that information was required in response to the 308(b) Request before the Commission could process certain of Kay's pending applications. WTB Ex. 4. The Bureau stated: "Please be advised that if you claim copyright protection in your response, we require that you file 50 copies of your response...as well as a full justification of how the copyright laws apply, including statutory and case cites...." *Id.* When Kay received this letter he "was totally incredulous." Tr. 2344. He explained:

I knew of no reason whatsoever why the Commission would ever want 50 copies of the most confidential information of my company for any other purpose but to distribute it. We had asked for confidentiality, they had refused. When we said we were going to copyright it, now they want 50 copies of it. I had dealt with the Commission before and requests of confidentiality had been routinely granted. It was customary, it was never a problem receiving confidentiality from the Commission. And, here they were denying it. Then we said, well, we have to get this somehow. We're going to copyright it and they want 50 copies. What could they possibly want 50 copies for, but to give it to exactly everybody I didn't want to have it? My competitors who are public and who knows who, anybody conceivably that asked for it. I just couldn't do that. I was flabbergasted and dismayed.

Tr. 2344-2345. Just two days later, on May 13, 1994, the Bureau sent a virtually identical letter directly to Kay, making the same request in connection with another pending application and

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<sup>5</sup> This procedure was also problematic for Kay in terms of the scope of the Bureau's request. As Brown had pointed out in his February 16, 1994, the Bureau was seeking "essentially all of the records which constitute Mr. Kay's business." WTB Ex. 348 at p. 1. In order to fully and unconditionally comply with the 308(b) Request, Kay would have been required to produce virtually all of the same documents he ultimately produced to the Bureau in discovery, namely, approximately 36,000 documents which took his staff about three months to compile. Tr. 1030-1031. Responding to the 308(b) Request would have required the production of only a few thousand less documents, but it "still would have been in the mid-thirty-thousand range of documents." Tr. 1040.

containing the same language requesting 50 copies if Kay sought copyright protection for his response. Kay Ex. 49.

25. Kay's interpretation of Bureau's initial reaction to his requests for confidentiality was colored in part by his past dealings with the Bureau regarding casual requests for confidential treatment. Kay explained as follows:

I know from past experience with the Commission that with extremely sensitive material the Commission has permitted licensees to loan but not submit material to the Commission. Therefore, the material never becomes the property of the Commission and is then returned. I had past experience with the Commission of submitting confidential materials to them, including highly sensitive, competitive material, which was handled by the Commission on that basis and was returned to me. I knew how it was handled when it was handled properly.

We requested confidentiality in basically the same fashion this time, my attorneys did, as was handled in, I think it was somewhere around mid-'93, when I requested confidentiality up front, and they said yes. And I said, okay, I'll submit it. You're free to read it for the record, and please return. And the material was marked copyright, proprietary, confidential, and its return was requested, and the material was returned by the Commission, and it worked fine about six months or seven months previous to the 308(b). So I have experience with that. This time they denied confidentiality, then they wanted 50 copies, then they quoted FOIA language to me. What do you want me to believe?

Tr. 944-945. Kay was extremely concerned because the 308(b) Request was seeking "literally the entirety of the most confidential information of my company." Tr. 2342.

26. On May 17, 1994, Brown responded to the Bureau's May 11 and May 13, 1994, letters, WTB Ex. 5, and specifically challenged the Bureau on the request for 50 copies:

We respectfully note that we have filed the number of copies of Mr. Kay response which are required to be filed by Section 1.51 of the Commission's Rules. However, you have requested 50 additional copies ... Since the Commission could not possibly require 50 copies for its own internal use, the only reasonable conclusion is that the Commission intends to make further circulation of Mr. Kay's response beyond the Commission. It was specifically to prevent such distribution that ... that Mr. Kay requested confidentiality for his response and provided the Commission with notice of his copyright.

WTB Ex. 5 at p. 1.

27. In Brown's May 17, 1994, letter challenging the request for 50 copies (WTB Ex. 5), Brown reiterated some of the same legal objections to the 308(b) Request that he had set forth in his second April 7, 1994, letter (WTB Ex. 3). Brown further put forth arguments

demonstrating that the information requested in the 308(b) Request was not relevant to the resolution of any of the specific pending applications addressed in the Bureau's May 11 and May 13, 1994, letters. WTB Ex. 5 at pp. 2-3. Brown suggested that progress could be made on the matter if the Bureau would request specific information concerning each of the specified applications rather than pursuing an open-ended request that essentially required Kay to produce virtually all of his business records without any guidance as to what the Bureau was seeking or what its specific concerns might be. *Id.* at p. 4. The record does not reflect that the Bureau ever acknowledged or answered Brown's May 17, 1994, letter.

28. The Bureau responded to Brown's April 7, 1994, letters (*i.e.*, WTB Exs. 2&3) on May 20, 1994, WTB Ex. 6.<sup>6</sup> The Bureau concluded that Brown's April 7 letter "is inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission." The Bureau went on to call it "a studied effort to avoid producing any information." WTB Ex. 6 at p. 1. The Bureau stated that "[w]ith respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of [the Commission regulations implementing the Freedom of Information Act] routinely available for public inspection." *Id.* Kay viewed this not so much as a grant of confidentiality, but rather as the Bureau simply quoting the FOIA rules. Tr. 926.

29. Kay's confidentiality concerns did not arise in a vacuum. Shortly after Kay received the Section 308(b) letter, he became aware that his competitors had a copy of it and were showing it around the Los Angeles mobile radio community. Tr. 2498-2499. As the result of some FOIA litigation against the Commission, in the fall of 1994, Kay learned that the Bureau had, in fact, contemporaneously sent blind carbon copies of the Section 308(b) letter to at least six different individuals who were competitors, customers, and/or potential customers of Kay. Tr. 2497-2498; Kay Ex. 62.

30. Knowing that his competitors were already using the letter against him, and that they would certainly attempt to get their hands on any information Kay produced in response to it, Kay had asked that his response not be made available for public inspection. When the Bureau refused this request, Kay's attorneys then indicated that the responses would be copyrighted, and even placed a copyright notice across the bottom of their substantive communications with the Bureau on the subject. At that point the Bureau demanded 50 copies of the materials to be produced. Tr. 2344-2345.

31. Competitive considerations were not the only basis for Kay's confidentiality concerns. In addition to seeking the identity and contacts for Kay's customers, the Bureau was also seeking information regarding the configuration of the customers' systems. Kay believed he had a duty

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<sup>6</sup> The May 20 letter stated that it was responding to an April 8, 1994, letter, but it is clear from the context that it was in response to both the April 7 substantive response (WTB Ex. 3) and the April 7 request for confidentiality (WTB Ex. 2).

to his customers, over and beyond his own self-interest, to hold such information in the strictest confidence. He testified as follows:

The release of that information to the public would not only adversely affect my company, but my customers, as well. It is -- radio shops just do not release the system configuration of their customers' radio systems to the public. It's like releasing private citizens' cellular telephone numbers. It's just simply not done.

The consequences to my company would be direct and economic. It would probably ruin my company. My customers expect me to maintain confidentiality of their records and their system configurations. I can't just release customers' information to the public. Can you imagine the liability of releasing an armored transport company's frequency codes to the public? All it takes is one robbery where the bad guys know the frequency information and there's big trouble

The same goes with alarm response companies and armed guard companies. We just cannot release that information to the public under any circumstances. To do so would endanger lives and property of my customers, their employees, and the liability to my company would be incredible.

Tr. 2342-2343.

32. In April 1994, before Kay's response to the 308(b) Request was due, an event occurred which increased Kay's suspicions and apprehension that the Bureau staff was acting in bad faith. At the time of the 308(b) Request, Kay had pending before the Commission a request pursuant to the Commission's "finder's preference" program in which he was seeking a dispositive preference for a frequency that had been abandoned by another licensee, Thompson Tree Service. The purpose of the finder's preference program was to promote efficient spectrum utilization by encouraging licensees to locate unused authorizations. Such "finders" were rewarded with dispositive preferences allowing them to apply for the abandoned channel without being subject to competing challenges. Tr. 2345-2346.

33. Kay had previously written to the Bureau explaining that the Thompson Tree facility had been abandoned, and informally asking that the authorization be canceled in FCC's rules. He later filed the formal finder's preference request when the Bureau did not act on his informal request. In response to Bureau inquiries, Thompson Tree admitted that it had stopped using the station more than two years earlier, but expressed a desire to nonetheless retain the license in order to preserve the investment they had in the station. Kay thereupon contacted Gail Thompson of Thompson Tree and reached an accommodation with her whereby Thompson Tree would acquiesce in the cancellation of its license and Kay would provide it with repeater service so they would not lose their investment in their radio system. Tr. 2347.

34. About a week to ten days later, Gail Thompson called Kay to report that she had just received an unsolicited telephone call from Anne Marie Wypijewski, the Bureau staff person

handling Kay's finder's preference request. Wypijewski advised her that the Bureau had no choice but to cancel the Thompson Tree authorization and would be doing so shortly, but that Thompson Tree could immediately reapply for the authorization. Wypijewski did not formally advise Kay of the denial of his finder's preference request until about a week after Wypijewski's telephone call to Gail Thompson. Tr. 2347, 2547.

35. Kay viewed Wypijewski's actions as a blatantly improper maneuver which destroyed any confidence he might otherwise have had that information he provided to the Bureau would be held in confidence or that the Bureau was acting in good faith. As he explained:

This was equivalent to a judge - because Anne Marie is decision-making staff acting, in fact, as a judge, weighing our finder's preference, releasing what she's going to do, how she's going to rule, before she releases the ruling, to tell Mrs. Thompson how to beat the effect of the ruling, to literally take from me that which I had reported in good faith to the Commission and had filed as a finder's preference. It was, to me, a direct stab at me to take away that which I had worked for, that I had in accordance with the rules, properly filed and was, in fact, an invalid license. She was taking away from me that which I had worked for and was doing it without notifying me.

I was thoroughly of the opinion it was highly improper if not what they call ex parte representation made. This wasn't Mrs. Thompson calling in to check on something. This was Anne Marie going out of her way to tell Mrs. Thompson how to beat James Kay on a perfectly legitimate finder's preference and a perfectly legitimate report that Mrs. Thompson's license is canceled automatically. It was a way of sticking me and to help Mrs. Thompson and it just plain was wrong....

I can't trust the Commission to play by the rules and maintain confidentiality, but going out of their way to make telephone calls to tip people off how to beat me, with pre-release of decision material, how can I trust them?

Tr. 234-2350.

36. Apart from the communications by Wypijewski, Kay viewed the denial of his finder's preference request in and of itself as yet a further indication of the Bureau's bad faith. The Bureau denied the request on the stated ground that the station was already the subject of an investigation at the time it was filed. Tr. 2526. Kay was knowledgeable of the finder's preference procedures, having filed between eight and fifteen such requests during his career. Tr. 2547. He understood that the policy of denying a finder's preference request on the basis of an existing investigation is intended to prevent a licensee from taking advantage of investigatory and enforcement work already undertaken by the Commission. In other words, the rationale of the finder's preference program is to encourage licensees to seek out fallow channels and then reward them for their efforts--not to allow them to simply piggy back on somebody else's work. Tr. 2548-2549. But in this case the ostensible "existing investigation" was nothing more than the informal letter Kay himself had previously filed calling the matter to the Commission's

intention. Tr. 2525, 2549-2550. Kay had never heard of a finder's preference being denied on the sole ground that the party requesting the preference had already informally brought the matter to the Commission's attention prior to formally submitting the request. In Kay's words: "It was unique. I think to this day it remains unique." Tr. 2550-2551.

37. Brown confronted the Bureau a second time regarding the request for 50 copies. In a letter dated May 26, 1994, Brown again asserted that the "request that [Kay] submit 50 copies...clearly indicates [an] intent to disclose information to a substantial number of members of the public, even though Kay has not received notice ... that any person had requested the information." WTB Ex. 9 at pp. 2-3. Brown went on to explain that Kay was asked to provide the names, addresses, phone numbers, and contacts of his business customers, in addition to the operating particulars of their accounts. Brown expressly advised the Bureau that "Kay has no confidence that the Commission would not disclose such crucial information to other persons, whether routinely or non-routinely." Brown expressly and specifically asked for comment and clarification as to this point. *Id.* at p. 3. The next day, on May 27, 1994, the Bureau, wrote a response to Brown. WTB Ex. 10. While addressing various other points raised in Brown's May 26 letter, the Bureau neither acknowledged nor answered Brown's pointed and explicit expression of concern and request for clarification as to the demand for 50 copies of Kay's responsive materials. *Id.*

#### Efforts to Clarify and Narrow the Scope of the 308(b) Request

38. Brown again wrote to the Bureau on May 25, 1994, this time seeking clarification of the 308(b) Request. WTB Ex. 7. Brown wrote:

In your letter dated May 20, 1994 ..., you indicated the Commission would be willing to clarify its request .... Your letter to Mr. Kay dated January 31, 1994, had not indicated that any clarification might either be required or provided. However, your letter dated May 20 indicates that clarification might be possible. Accordingly, we respectfully request clarification of certain portions of the Commission's request.

*Id.* at p. 1.

39. Brown first sought clarification as to which specific facilities were the subject of the Bureau's concern. The 308(b) Request, he reasoned, stated that it was prompted by complaints--the details of which the Bureau had thus far refused to disclose to Kay--that must reference specific facilities and particular alleged violations. "However, rather than requesting information concerning those facilities about which it had reportedly received complaints, the Commission has requested essentially all of the information which Mr. Kay might have concerning all of the stations which he operates." *Id.* Thus, Brown asked that the Bureau clarify the 308(b) Request "such that it specif[y] the facilities about which complaints are being held and such that it request[] information only about the specific stations and only such information as would allow the Commission to ascertain the veracity of the complaints." *Id.* at pp. 1-2. Brown explained

that the clarification would "allow Mr. Kay to confront directly the exact accusations which have reportedly been made against him." Id. at p. 2.<sup>7</sup>

40. On the next day, May 26, 1994, the Bureau issued a terse letter summarily rejecting the request for clarification, stating:

The Commission's request asks for basic information that Mr. Kay would have readily available if he is indeed providing communication services to customers. In fact, such information would be a necessity in order to even issue monthly bills to users of the many systems for which he is apparently licensed.

WTB Ex. 8 at p. 1. Confronted with this refusal to disclose the particular substance of the alleged complaints against Kay, Brown immediately wrote to the Bureau on May 26, 1994, seeking more specific clarification of each of the items contained in the 308(b) Request and asking that the Bureau reconsider its May 26 letter. WTB Ex. 9. The Bureau similarly rejected this request in a letter dated May 27, 1994. WTB Ex. 10.

#### The Substantive Response to the 308(b) Request

41. The 308(b) Request, dated January 31, 1994, initially called for a response within 60 days, i.e., by Friday, April 1, 1994. WTB Ex. 1 at p. 2. By letter dated March 1, 1994, the Bureau had extended the deadline thirteen days to April 14, 1994. WTB Ex. 349 at p. 2. On May 20, 1994, the Bureau effectively extended the response date to June 3, 1994. WTB Ex. 6 at pp. 1&3. Brown repeatedly thereafter sought a further extension of the deadline, citing among other things pending FOIA litigation in which Kay was attempting to secure production of the alleged complaints against him, WTB Exs. 7&9, but the Bureau consistently refused to extend the response date beyond June 3, 1994, WTB Exs. 8 & 10.

42. On June 2 1994, Brown submitted a substantive response to the 308(b) Request. WTB Ex. 11. It was accompanied by a declaration in which Kay verified the accuracy of the factual assertions contained in the letter. WTB Ex. 11 at p. 7. Kay testified: "I could only certify to the factual information that would be within the scope of my knowledge...contained in there, and I would have not have signed the declaration if I detected any errors." Tr. 932. Brown's June 2 letter first explained that Kay had an interest in two closely held corporations, Buddy Corp. and Oat Trunking Group, Inc., and that Kay "does not operate any station of which either he or the two above named corporations is not the licensee." Id. at p. 1. The letter further explained that Kay did not hold any license which the Commission would not already have in its own record. Id. at p. 2.

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<sup>7</sup> Brown also specifically asked that the Bureau examine the complaints it had received to determine whether the complainants had made out a prima facie case, taking into consideration the credibility and bias of the complainants. Id. at p. 2.

43. Brown renewed his various legal objections to the Bureau's request for information regarding Kay's U.S. Forest Service permits, including relevancy and the Bureau's refusal to disclose the particulars of the alleged complaints against Kay. Id. at pp. 2-3 & 4. Regarding the request that Kay provide the Bureau with the original grant date and the construction completion date of each of his licenses, Brown responded that there is no requirement that Kay maintain records of license grant dates, that the Commission already had the license grant dates in its own records, and, to the extent Commission rules required Kay to report construction completion dates, he had already done so at the appropriate times. Id. at pp. 3-4.

44. In response to the Bureau's request for Kay's loading numbers, technical configurations, etc., Brown clarified that Kay's combined systems served a grand total of 7,000 units, Id. at p. 4, but he asserted that providing specific loading information as of January 31, 1994 (as the Bureau had requested) could not possibly provide information that would prove or disprove any complaint the Bureau may have received, because the systems are in continual churn with customers being added and deleted all the time. Id. at p. 5. Brown further noted that the loading was not a factor as to any of the specific pending applications which the Bureau was claiming could not be processed absent a response to the 308(b) Request. Id. at p. 5.

45. Brown once again noted the exacerbation of Kay's confidentiality concerns by the Bureau's unexplained request for 50 copies of his response:

The Commission's ... demand that Mr. Kay supply ... 50 copies ... calls into serious doubt for Mr. Kay the Commission's intent to honor his request for confidentiality. Because the confidentiality of the information which the Commission has requested concerning the identity of Mr. Kay's customers is crucial to his business, Mr. Kay respectfully submits that his declining to submit such information to an agency which refuses to promise to keep such information confidential is entirely reasonable, and that in the absence of such a promise ... the Commission's request for such information is not a reasonable exercise of its authority.

Id. at p. 6. Brown submitted only the number of copies of his June 2, 1994, letter required by Section 1.51 of the Commission's Rules. Id. at p. 7. He also included the copyright notice across the bottom of each page.

46. Brown asserted the following extensive legal objection to the Section 308(b) Request:

To date, the Commission has refused to disclose to Mr. Kay the complaints on which it reportedly based [the 30(b) Request], and has refused to postpone the date for him to respond to the Commission's request until such time as the courts can determine, in currently pending [FOIA] litigation, his right to have disclosure of the complaints on which the Commission's request was reportedly based. Mr. Kay is aware that the Commission has, from time to time, received allegations that Mr. Kay had engaged in serious criminal activity. Not only has the Commission refused to allow Mr. Kay to

inspect the complaints which reportedly formed the basis for its request, but the Commission has refused to provide Mr. Kay with immunity from criminal prosecution based on the information which it has requested. The Commission has threatened to impose sanctions on Mr. Kay for failing to comply with the Commission's request for information, including an express intent to sanction him by subjecting him to the cost and loss of time involved in undergoing a hearing before the Commission. With the Commission in the posture of refusing to disclose to Mr. Kay the alleged facts of the complaints which reportedly formed the stated basis for the Commission's request, refusing him a reasonable opportunity to ascertain the specific facts of the reported complaints, refusing to permit him an opportunity to confront his accusers and their accusations, and refusing to provide Mr. Kay with immunity from criminal prosecution, all the while threatening to impose sanctions on Mr. Kay, including the intended abuse of the Commission's hearing process, itself, as a sanction, Mr. Kay respectfully submits that the [308(b) Request] is entirely unjustified and unreasonable, and constitutes a violation of Mr. Kay's right to due process of law, as well as a violation of other rights to which Mr. Kay is entitled under the United States Constitution.

Id. at p. 6.

47. The Bureau sent Brown a responsive letter on June 10, 1994, WTB Ex. 12. The Bureau labeled the response "woefully inadequate" and threatened that it "places Mr. Kay in jeopardy of Commission sanctions which include revocation of licenses, monetary forfeiture, or both." Id. Having heretofore ignored each of Brown's previous objections to the demand for 50 copies, the Bureau now for the first time, in the June 10 letter, modified that "information submitted will be kept confidential...and only 1 original and 1 copy of the information need be filed." Id. The Bureau apparently considered that as "[h]aving removed the basis for Mr. Kay's objections," id., but it did not otherwise substantively address or respond to any of the extensive legal objections put forth in Brown's June 2 letter. The Bureau simply demanded the submission of the information by July 1, 1994, id., and further "warn[ed] ... that your continued posture in this matter places all of Mr. Kay's licenses in jeopardy of revocation." Id. at p. 2.

48. On June 17, 1994, Brown wrote to the Bureau to advise it of a Federal District Court ruling earlier that day whereby the Commission had been directed to provide Kay with a "Vaughn Index" <sup>8</sup> of documents that were being withheld notwithstanding Kay's FOIA requests. WTB Ex. 13. Brown explained that "[t]o date, the Commission has not disclosed to Mr. Kay the complaint(s) which reportedly formed the basis for its" 308(b) Request. Id. at p. 2. Brown asked for an extension of time to respond to the Bureau's January 31, 1994 letter (WTB Ex. 12) until after final resolution of the FOIA litigation. He reasoned that this would "give Mr. Kay a fair opportunity to be informed as to the factual basis, if any, of the [complaints] before the Commission demands that he attempt to submit information responsive to those complaints." Id. at p. 2.

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<sup>8</sup> See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

49. On June 22, 1994, the Bureau responded to Brown and denied the request for extension. WTB Ex. 14. The Bureau interpreted "the numerous requests for extension of time, copyright notices and [FOIA] requests...[as] dilatory tactics meant to discourage the Commission from carrying out its statutory responsibility in this matter." *Id.* at p. 1. The Bureau repeated the threat that Kay's "continued posture in this matter places all of its licenses in jeopardy of revocation." *Id.* at p. 2. On June 30, 1994, Brown responded. WTB Ex. 15. As to each of the specific items in the 308(b) Request, Brown referred the Bureau to earlier responses filed on behalf of Kay. *Id.* at pp. 1-2. Brown renewed, clarified, and expanded his legal objection on the ground that the specifics of the alleged complaints had not been disclosed to Kay. *Id.* at pp. 203. Mr. Kay understood that, as of June 30, 1994, he was continuing to refuse to provide the Bureau with some of the information sought in the 308(b) Request, but he indicated that this was because his "attorneys took legal positions in answer to [the 308(b) Request] which are clearly elaborated upon in a series of letters to the Commission." Tr. 1035.

#### The Northridge Earthquake

50. The Northridge earthquake occurred on January 17, 1994, at 4:31 AM, Pacific Standard Time. Tr. 1416, 1684, 2206, 2270-2271, 2283. This was less than two weeks prior to the Bureau's 308(b) Request.

51. The epicenter of the Northridge earthquake was only 3.5 miles from Kay's business offices and shop in the Van Nuys section of Los Angeles. WTB Ex. 17 at p. 3; Tr. 2211. The earthquake did substantial damage to Kay's business. Randolph French, a bench technician who has worked for Southland for nearly seven years, described the damage as follows: "Well, ceiling tiles broken down, light fixtures from the ceiling falling, steel shelving units dominoed over. Computers smashed, all kinds of parts inventory was, had fallen all over the place." Tr. 2272 (emphasis added).

52. Anthony Marshall, who has been a Southland employee continuously for the past 14 years and on and off for four years prior to that, Tr. 2307, was one of the first of Kay's employees to arrive at Southland shortly after the earthquake on the morning of January 17, 1994. Tr. 2311. Here is how he described what he found upon his arrival.

Jim was there already, and the place was demolished. ... Nothing is where it would have normally have been. The dropped ceiling tiles, the light fixtures on the dropped ceiling, anything at the ceiling levels was on the ground. All the office cubicles were basically busted apart and all over the place. The desks were -- anything that was on top of a desk was on the ground. Computers, typewriters, everything was a complete shambles and a mess. It looked like a tornado had literally gone through the inside of the building.

Tr. 2311-2312.

53. Deborah Kay Marshall (Anthony Marshall's spouse, Tr. 2307), also a Southland employee for the past 14 years, described the damage as follows:

Everything. Cubicles were smashed and caved in on top of one another, on top of computer systems or telephones. Our stock room had shelves, racks that we had built in there, where the radios were all kept. They were all caved in on top of one another. We couldn't even enter that room. The sales floor, where we kept all the radios in showcases, the showcases were all smashed and broken and radios were pretty much on the ground, with everything on top of them. When we went back into the Tech Rooms, we found the same thing. The tech benches were all knocked over, the equipment all knocked over. Things were broken I mean, it was a disaster. We even looked at cracks in the walls, cracks in the floor.

Tr. 2283-2284.

54. Kay himself gave the following picture of the damage:

Basically, the buildings looked like they'd been picked up, shaken violently up and down and sideways, and then placed back down. Nothing was where it belonged. Bookcases fell over. The floors were strewn with books and papers. My desk collapsed, spewing hundreds of files all over the floor. Credenzas collapsed, spewing files everywhere. The primary computer was damaged at my shop. Water pipes, the water heaters were fractured, spewing water all over everything. Electricity was out. Basically, the place was a disaster. Huge racks that we had radios on in our storage room had teeped. They'd fallen over, dumping all their contents on the floor, till there was nothing but a pile of radios three feet tall. Some areas were almost impossible to get into, because doors were blocked. You had to use alternative routes to even get in the various parts of the shop. It was basically like a horde of vandals had descended for a number of hours, with the intent of doing nothing but wrecking the place.

Tr. 2340-2341.

55. Kay's personal residence was also damaged in the earthquake and was in total disarray. Tr. 2340, 2516. The damage to Kay's residence currently stands at about \$150,000 to \$200,000 and is still climbing. To this day he is still doing repairs and still finding damage. Tr. 2516-2517. Kay obtained SBA Disaster Loan Assistance, both personally and for his business, which reimbursed only a fraction of the total damages he incurred. Kay Ex. 11.

#### The Effect of the Earthquake on Kay's State of Mind

56. Jeffrey L. Cohen is a California attorney who began doing legal work for Kay in about 1991. Tr. 2204-2205. During 1992, Cohen communicated with Kay on a weekly basis. Tr. 2205-2206. During 1993, Cohen communicated with Kay at least three times a week and, during the later part of the year, almost on a daily basis. In addition to telephone conversations, Cohen also frequently met with Kay approximately once every two weeks during the first three quarters of 1993, and then about twice a week during the fourth quarter of 1993. Tr. 2206.

57. Cohen testified that there was a remarkable change in Kay's demeanor and personality as well as in his professional and personal habits after the Northridge earthquake. According to Cohen, prior to the earthquake:

[Kay] was a fairly easy client to work with. He was very focused on his business. He understood general basic legal issues. In my dealings with him, basically he would consult with me regarding sometimes general business problems, also the litigation I was representing him with. He would talk about general options and other matters dealing with that, and he would basically listen to what was being presented, discuss the options, and then make the decision based on those matters. He was attentive, demanding, but basically fair to deal with.

Tr. 2207-2208. Kay was almost always responsive to Cohen's requests. Tr. 2208. After the earthquake, however, he changed quite a bit both physically and emotionally. Cohen noticed that Kay did not look healthy, that his skin pallor was different, that he appeared not to be sleeping well, and that his eating habits became atrocious. Tr. 2208. Kay also seemed not to be attending to his personal appearance. Cohen noted that he was not getting his hair cut as often and that he often wore the same clothes and they were much more rumpled. Tr. 2209-2210.

58. Cohen further explained the change in Kay as follows:

His ability to focus on matters was changed considerably. Prior to that time, we had almost established a pattern of how we dealt with any type of legal issue or problem that arose and basically what I would do is give him my view of what we thought was the legal issue and what I thought his goal was, and then I'd give him the various options and we'd discuss the ramifications.

Tr. 2208-2209. Cohen also participated in some conference calls during 1994 with Kay and Brown & Schwaninger, Kay's Washington, D.C. communications attorneys at the time. During these calls, Cohen observed that Kay "was having difficulty understanding the legal ramifications of what was occurring." Tr. 2216. Cohen attributed this to Kay's inability to stay focused. Id.

59. Cohen believed that Kay was depressed as a result of the devastation to his business from the earthquake. Tr. 2210. This opinion was based not solely on his familiarity with Kay, but also on his own personal understanding of the earthquake as a Los Angeles resident who lived through it and was affected by it. Tr. 2207. As Cohen observed, "people who weren't there don't understand the devastation to business that occurred." Tr. 2210. Cohen's law firm continued to represent Kay for approximately two more years after the Northridge earthquake. During this period, he observed a gradual recovery and improvement in Kay's business acumen and ability to concentrate. As Cohen put it: "The farther he got away from the earthquake, the better he was." Tr. 2212. But up until the time Cohen's firm stopped representing Kay, in late 1995 or early 1996, Kay "was never back to what he was prior to the earthquake." Id.

60. Cohen's impressions were corroborated by those who worked with Kay. Randolph Scott French has worked as a bench technician for Southland Communications since May 1992, i.e., for nearly seven years. Tr. 2270. In the course of his duties, French had contact with Kay several times a week. Tr. 2275. He found Kay to be more irritable after the earthquake. Tr. 2276. Deborah Marshall, who has known and worked with Kay on a daily basis for 14 years, testified that Kay was much more impatient after the earthquake and seemed preoccupied. Tr. 2294-2295. Anthony Marshall, who has also known and worked closely with Kay for some 14 years, characterized Kay's behavior after the earthquake as follows:

He was very short and quick to temper on the exact same items that before he would have very patiently explained it to you in detail. Where, after the earthquake, it was like, I don't have time to deal with this. I've got other things on my mind. You know your job, do it and get it done.

Tr. 2313-2314.

#### Kay's Computer System

61. Kay acquired a computer system in approximately 1988 to 1989 that was based on the Xenix operating system, a system similar to Unix. Tr. 1037. Craig Sobel, who has both computer and accounting expertise, Tr. 1390-1391, has provided consulting services to Kay for the past ten years. Tr. 1392. Craig Sobel had no role in maintaining Kay's Xenix computer system. His duties were limited to programs he wrote for Kay to run on the Xenix system. Tr. 1397. He does, however, maintain Kay's DOS-based system which later replaced the Xenix system. Tr. 1398. Sobel developed a custom billing program for the Xenix system. Tr. 1394-1395. The billing software was designed to cover the repeater services provided by Lucky's; it did not cover Southland's equipment and service operations. Tr. 1395. Craig Sobel made many changes and modifications over the custom billing package over the years. Tr. 1037-1038, 1395.

62. The user interface for the custom billing package designed by Craig Sobel was the "customer maintenance screen". Tr. 1399. Kay's staff used these screens to enter and modify customer data, and they could also bring up and view these screens on a computer monitor. Tr. 1036. The billing software package was never intended as a means of maintaining system loading records for licensing purposes. The primary purpose of the program was to generate customer bills. Tr. 1038. The program was modified in 1992 to allow inclusion of information regarding the number of mobiles a customer might have at a given site. Tr. 1395. Information on the number of mobiles was included primarily as a convenience to Kay and his staff, but it was not audited and was not necessarily accurate or up to date. Id. The program design parameters did not require that the number of mobiles even be entered into a customer maintenance screen. Tr. 1422, 1432-1433.

63. Kay was using this Xenix-based custom billing program in January 1994. Tr. 1038. The Xenix system was damaged in the Northridge Earthquake, resulting in frequent crashes and the eventual failure of the system. Tr. 1038, 1416. The Xenix system was replaced in

approximately April 1994 with a DOS-based computer system. Tr. 1039. Craig Sobel was retained to convert the billing system from the Xenix to the DOS system. Tr. 1417. During the process of converting from the Xenix to the DOS system, Craig Sobel discovered that several files had corrupt data and had to be removed. There was no hope of reconstructing the corrupted files. Tr. 1418. The damaged files were removed entirely from the database file, and it would also have been necessary to remove all records dating prior to the date of the damaged records in order to preserve the accounting integrity of the billing program, *i.e.*, to keep it "in balance". Tr. 1428-1431. Craig Sobel testified that the corruption could have resulted from damage to the data files caused by a power shut down or a hardware failure. tr. 1449. There were power outages at Kay's shop for weeks and months following the January 17, 1994, Northridge earthquake. Tr. 1684, 1688, 2344. Kay and his staff salvaged what data they could from the Xenix system, transferred it to the DOS system, and then set about the task of re-entering the lost data manually from information contained in paper files. It took Kay's staff at least two to three months to re-enter the customer data into the DOS system. Tr. 1039-1040, 1682-1683, 2285.

64. During discovery, Kay produced copies of each customer print screen available in his system as of March 1995, totaling more than 850 pages. WTB Ex. 347. Craig Sobel was retained to modify Kay's system to make it possible to print the screens and to assist Kay's staff in responding to the Bureau's discovery requests. Tr. 1036, 1399. Prior to Craig Sobel's modifications, in order to have generated WTB Ex. No. 347, Kay's staff would have been required to bring up each screen, one at a time, hit the "print screen" button on the terminal keyboard, then walk over to the printer and hit the form feed, and repeat this process more than 800 times. Tr. 1400. This manual procedure would not have been possible, however, under the Xenix system used by Kay prior to April 1994. Tr. 1403. In a good faith effort to comply with discovery demands, Kay had Craig Sobel write a program in March 1995 that could be executed on the DOS system to run this process automatically, and that is how WTB Ex. 347 was generated. Tr. 1400-1401.

65. In November 1995 Kay supplemented his discovery responses by providing the Bureau with so-called "Loading Reports." WTB Ex. 19. WTB Ex. 19 was generated in response to Bureau Interrogatory No. 4 which requested: "With respect to each of the call signs listed in Appendix A [of the HDO], identify each and every 'end-user' (*i.e.*, customer) and the number of mobile units of each 'end-user' (*i.e.*, customer) since January 1, 1991." WTB Ex. 19 at p. 1. Providing information entirely responsive to this request was problematic because, as previously explained, (a) Kay neither maintained nor organized his billing records by call sign, and (b) Kay's billing system was not designed to maintain historical tracking of outdated customer configurations.

66. Kay once again enlisted the assistance of Craig Sobel to prepare the supplemental response that is set forth in WTB Ex. 19. In order to generate this report Kay used a "loading report" feature built into the billing software. Craig Sobel was not sure when this capability was added to the program and did not know whether it was available in the Xenix system that had been in use prior to April 1994. Tr. 1412, 1416. The loading report capability did exist, however, on the DOS system as of November 1995, but it only generated current customer

information. Craig Sobel assisted Kay's staff in generating and printing loading reports that included, to the extent possible, historical data. Tr. 1411-1412. Mr. Sobel explained the procedure as follows:

There was quite a number of customers on Mr. Kay's datafile, customer datafile that had been deleted over the years. ... We had to remove the delete flag from each of these records, store the fact that they were deleted someplace else, calculate these reports, and then redelete them when we were all done.

Tr. 1412.<sup>9</sup> Craig Sobel also facilitated the printing of the reports by creating a routine that allowed the reports to be calculated and printed as a batch, rather than requiring Kay's staff to generate the reports one-by-one sequentially typing in each frequency and site. Tr. 1413.<sup>10</sup>

67. Even with all of these modifications to his system in an effort to respond to the Bureau's discovery request, it was still not possible for Kay to provide a complete and accurate account of historical loading. In the custom billing package designed by Craig Sobel and used by Kay, when data was changed in a particular field, the old data was gone. For example, if a customer record were modified to indicate a change from one frequency to another, or reflect an increase or decrease in the number of mobiles, the old information would be overwritten with the new information and the system would maintain no record of the change. Tr. 1433. Kay did not specifically ask that the billing system be designed in this way. It is simply the way Craig Sobel designed it, and he had seen other systems designed in this manner. Tr. 1437. Accordingly, while WTB Ex. 19 included existing and deleted accounts dating back to September 1993, it included those accounts only in their most recent configuration in the database. Any previous information was no longer reflected. Tr. 1433-1435.

68. James P. Hanno, who testified as an expert witness, has over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant. Kay Ex. 63 at ¶¶ 1-4. Hanno examined Kay's billing system and opined as follows:

It is not possible, using Mr. Kay's billing system, to reconstruct a "snapshot" of system loading for a particular past date. There are at least two reasons for this. First, the system is not designed primarily for system maintenance and loading, but rather for

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<sup>9</sup> Normally, when a record is deleted from the database, it is not actually removed, but rather a flag is set indicating to the program that the record has been marked for deletion. The record remains, however, until affirmative steps are taken to permanently remove it, but data in "deleted" records would not be included in any loading reports. Tr. 1428-1429.

<sup>10</sup> It was not necessary to un-suppress deleted records to generate the customer maintenance screens produced in March 1995 (WTB Ex. 347). It was still possible to view (and hence print) a customer maintenance screen after the record had been deleted, however, the data from the deleted record would not, absent the modification, be included in a loading report. Tr. 1436. Accordingly, both WTB Ex. 19 and WTB Ex. 347 represent essentially the same universe of data, but at two different points in time, WTB Ex. 347 being as of March 1995, and WTB Ex. 19 being as of November 1995.

billing. Second, each time a customer record is edited (e.g., when a customer adds or decreases units, modifies service options, etc.) the old information is overwritten and thus lost. In this regard, Mr. Kay's custom system is typical of the off-the-shelf software packages designed for small SMR operators.

Id. at ¶ 8.

69. In Kay's normal business practice, he did not maintain and organize his records by call sign. Tr. 987. James Hanno observed:

Mr. Kay stores customer information in his billing system by frequency and repeater location rather than by call sign. In my experience, this is not uncommon in the SMR industry, particularly when there are multiple sites covered by a given call sign, multiple call signs at a particular repeater site, and sometimes even multiple call signs for a single repeater. It is much simpler and more meaningful to the operator to keep the information by site location and frequency.

Id. at ¶ 9. After Kay's staff, with Craig Sobel's assistance, had generated the November 1995, "loading report," Kay went through it and cross-referenced the repeater locations and frequencies against his paper records and manually wrote the corresponding call signs on each sheet. Tr. 986. This process required Kay to manually parse through the records for more than 150 call signs in order to comply with the Bureau's request. Tr. 987, 1160-1161.

70. In producing the November 1995 leading report, Kay expressly qualified it as follows:

These reports are generated as of November 9, 1995, and represent each customer's current repeater system configuration. ... No customer who discontinued service prior to September 1993 is included, and prior usage by customers of other frequencies, addition of sites, deletion of sites, additions of frequencies, deletion of frequencies, increases in mobiles, decreases in mobiles, and changes in frequency from prior system configurations are not reflected in the attached Loading Reports.

Note: records were not kept "by call sign." Information is kept by repeater customer name in current configuration only. Also, Kay's records do not reflect Kay's own shop use, nor records of other users in other shops who used radios at no charge, and these records do not include rentals, demos and loaners, because none of these records resulted in customer billing for repeater services, even though use of the repeaters did occur.

WTB Ex. 19 at pp. 1-2.

71. The data in Kay's computerized billing system is stored in files known as "DBF" files, i.e., in a standard database format. Tr. 1088-1089, 1420-1422. Concerns for confidentiality of customer data aside, the idea of producing the underlying DBF files from the billing system

in response to the Bureau's January 31, 1994, 308(b) Request was simply something that never occurred to Kay at the time, or even later during discovery. Kay was not intimately familiar with the internal workings of the billing system. Tr. 1088-1089. Kay had never before and has never since, produced any information to the government on magnetic media. Tr. 1044, 1095. The computer system was designed to generate customer bills, not to store and retrieve system loading data. Thus, even if Kay had been able to provide uncorrupted DBF files in January 1994, they would have been neither complete nor responsive to the 308(b) Request. The mobile loading data was maintained in the system solely for internal convenience, not as a legal record, and the data was not audited for accuracy or completeness. Tr. 1045.

72. As previously explained, the data files were generated and maintained by a billing software package custom designed for Kay. Tr. 1394-1385. Even if the Bureau had been provided with the DBF files, it would not have had the custom billing package needed to view and manipulate the files. Based on the testimony of Eric R. Johnson, a computer expert who testified at the hearing, there is reason to question the integrity and reliability of data produced by simply copying the DBF files. Although it is possible to view a DBF file generated by a custom database application in other software packages, it is not possible to insure that the integrity of the data will be maintained. This is because customer database applications are typically designed to have links whereby different data fields are interrelated and internal calculations are made. It cannot be assured that these internal links and calculations will be accurately reflected and reproduced if the DBF file is viewed with a software package other than its native application. Tr. 2046-2048.

73. The paper records produced by Kay in March 1995 (the customer maintenance screen printouts), WTB Ex. 347, and in November 1995 (the loading reports), WTB Ex. 19, contain virtually all of the same data that would have been contained in the DBF files. These productions actually were more accurate and reliable than the DBF files. Prior to producing the customer maintenance screen printouts in March 1995, Kay and his staff went through the more than 850 records, customer-by-customer, and did their best to audit the data to make sure it was accurate by matching it against the paper files and records. Tr. 1045-1046.

74. Kay generally performed the backups of the computer system. Backups of the Xenix system did not work properly, and the data was lost when the system ultimately crashed following the Northridge earthquake. Kay had backed up the Xenix system approximately every couple weeks, using a single backup tape that was overwritten each time. Kay understands that some sort of "file-allocation" table error on the Xenix server was duplicated on the backup, resulting in data loss. Tr. 1092. The last backup of the Xenix system would have occurred in January 1994. Tr. 1094. Kay later started doing backups of the DOS system in approximately July 1994. Tr. 1080-1090. On the DOS system, he performs backups approximately once a week and uses about three backup tapes which he rotates, overwriting the oldest one first. Tr. 1089-1091. Craig Sobel developed the backup routine, and Kay understood that it first erased the old files from the backup tape and then copied the current files from the server to the tape, so that the practical effect was "overwriting" the tape. Tr. 1090-1091.

75. Kay also had a practice under the old Xenix system of periodically purging deleted accounts from the billing system. Tr. 1094. Craig Sobel explained that when files are "deleted" from the system, they actually are simply marked for deletion (i.e., a delete flag is set), but are not actually purged until the database is "packed". Tr. 1428-1429. The Xenix system was last purged in approximately September 1993, and there have been no purges of the DOS system. Tr. 1094.

76. Just as it had never occurred to Kay to produce copies of the DBF files in response to Bureau requests for information, Tr. 1044, he likewise never considered producing the backup tapes in response to the 308(b) Request. Tr. 1095. When the idea was suggested to him during the hearing, however, he noted that, in addition to the fact that he had never previously provided any government agency with information in magnetic form, the backup tape cartridges would also have included a wide range of materials on his computer system (including confidential correspondence with legal counsel), and, like the DBF files themselves, would not reasonably have been responsive to the information request. Tr. 1095.

### Construction and Operation Issue

77. This issue may be divided into two parts: (1) whether Kay willfully or repeatedly violated rules regarding timely construction and/or permanent discontinuance of authorized facilities, and (2) whether Kay willfully or repeatedly violated rules regarding system loading.

#### Timely Construction and/or Permanent Discontinuance

78. Kay generally constructed facilities promptly after license grant, if not before. Tr. 959. Indeed, he had a financial incentive to do so, in that the sooner he constructed and got a station operational, the sooner he could place customers on it and start generating revenue. Tr. 2366-2367. Often repeaters were pre-constructed, in which case the construction date is the date of license grant. Tr. 959. In cases where Kay converted users' existing licenses to private carrier or SMR systems licensed to Kay, the facilities were already constructed upon grant of the conversion authorization. Tr. 900-901. Similarly, facilities associated with authorizations which Kay acquired by assignment were deemed "constructed" as of the date the assignment of license application was granted. Tr. 901. Even where application was made for a new facility, Kay often pre-constructed stations, installing all the hardware, tuning the transmitter, and arranging for it to be remotely activated upon receipt of authorization. Tr. 2366. Even when not pre-constructed, new installations were typically completed within two to three months after grant. Id.

79. When Kay completed construction of a new location, he jotted down the date on a slip of paper which he would stick in a file. When the 800A letter<sup>11</sup> arrived from the

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<sup>11</sup> 800A letters are form letters that the FCC routinely mails to licenses of 800 MHz systems inquiring as to the date and particulars of station construction. Tr. 983-984.

Commission he would then transfer the date and other pertinent information onto the 800A letter, mail it back to the Commission, keep a copy in the file, and discard the note. Tr. 958, 2367-2368.

80. Kay did not otherwise keep records specifically recording the construction completion dates of his facilities. This was due primarily to the way his systems were configured and how his business was operated. The measurements and alignment of Kay's repeaters was typically done weeks or months in advance of actual installation. Tr. 953. When equipment arrived from a vendor, it was untested, not tuned, and not assigned to a working frequency. Tr. 954. The equipment was removed from the box, aligned, tuned, power levels were set, and then set up on a test frequency. At that point it was placed on a shelf along with the other inventory and was not yet part of a particular station or call sign. Tr. 955. When a repeater was needed, one of these conditioned radios was pulled from the inventory. When a technician went to service a repeater site, he would frequently take one of the inventory repeaters with him and, if the problem was not something that could be easily repaired at the site, the malfunctioning repeater was removed, the inventory repeater was tuned to the frequency and installed, and the malfunctioning radio was returned to the shop where it could be repaired, if possible, and cycled back into the inventory. Tr. 956. As a result of this procedure, equipment was constantly being recycled, and Kay did not maintain records that associated and tracked a particular piece of equipment to a particular call sign. Tr. 956.

81. This practice regarding inventory and record keeping was reviewed by James P. Hanno, an expert witness with over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant. Kay Ex. 63 at ¶¶ 1-4. Mr. Hanno stated:

The procedure described above is typical of most SMR operations with which I am familiar, especially those using modular, rack-mounted units. As practiced by Mr. Kay, the only records maintained in these instances are any purchase invoices, shipping statements, etc., associated with the purchase, delivery, and acceptance of the repeater, and possibly any work orders for specific installations or repairs. It is my understanding that Mr. Kay does not maintain detailed serial number records tracking all the changes and repairs made with respect to a specific licensed location, nor does he maintain logs at the repeater locations themselves. In my experience, fewer than half of all SMR operators maintain any more detailed records in this regard than does Mr. Kay.

Id. at ¶ 11.

82. During the course of discovery, Kay provided the Bureau with as accurate and as complete information as possible regarding the dates on which his various facilities were constructed. In those cases where the facilities were neither pre-constructed, already constructed at grant, or there was no 800A letter, Kay did his best to determine the historical construction date by reference to other records, e.g., service invoices. Tr. 902. On or about May 11, 1995, Kay submitted his Amended Responses to Wireless Telecommunications Bureau's First Set of Interrogatories. Attachment A to that filing is a tabulation showing, inter alia, the license grant

date and construction date for each Part 90 facility licensed to Kay. WTB Ex. 290. For purposes of this proceeding, the parties have stipulated that, as to each site annotated as "Not in operation" in the "Comments" column of Attachment A, that site was either not timely constructed or that operation of that facility had been permanently discontinued as of May 11, 1995. Tr. 1232. The Bureau presented no evidence that any authorized facilities other than those specifically covered by this stipulation were not timely constructed or that service on each facilities has been permanently discontinued.

83. The Wireless Telecommunications Bureau's Statement of Readiness for Hearing was filed in this proceeding on or about June 3, 1998. Paragraph 14 of that pleading provided: "The Bureau intends to present evidence that Kay did not construct stations WPEE253, WIK726, WIK896, WIK664, WIL260, WIK983, WIH339, WIL469, WIK875, WIK287, WIK374, WNJL306, and WNXW487 by the pertinent deadlines." Kay's uncontested testimony as to each of these stations is as follows:

- WPEE253. Kay testified that this station was already constructed at the time the authorization was granted to him. Before it was licensed to him, Kay had been operating it as a community repeater on behalf of a customer, and it was later converted. Tr. 2363.
- WIK276, WIK896, WIK664, WIL260, WIK983, WIL469, WIK875, WIK287, and WIK374. Kay testified that each of these stations was timely constructed. He specifically recalled having a lease at Sierra Peak, first at the Meridian Building and later at the TLF Building, and timely installing all repeaters that were going into Sierra Peak. Tr. 2362-2365.
- WIH339. Kay recalled that this station was initially constructed at Mount Lukens at the time he acquired the authorization by assignment from a customer. Subsequently a location was added at Sierra Peak, and that modification was also timely constructed. Tr. 2365.
- WNJL306. Kay specifically recalls the timely construction of this station at Santiago Peak in January or February 1988 at the Meridian Building, in that he recalls "getting a flat tire 20 miles back in the middle of nowhere." Tr. 2365-2366.
- WNXW487. Kay testified that this station was timely constructed at both authorized locations, Heaps Peak and Santiago Peak, on a timely basis.

#### System Loading

84. Kay operated stations on a commercial basis providing repeater service to end users. He established repeaters and provided communications service to end users through those repeaters. This is akin to the provision of cellular service. Tr. 864. He offered these services

through Specialized Mobile Radio (SMR) stations that operated in the 800 MHz band, and through private carrier stations that operated in the 470-512 MHz band or "UHF". Tr. 1002, 1108. Kay's UHF stations were licensed in the Business Radio Service. Tr. 960-961. In both the 800 MHz and the UHF bands, Kay also operated community repeaters for customers. Tr. 971. In these circumstances the repeater authorization was held by the customer who either owned the repeater equipment or rented it from Kay. Tr. 938.

85. Prior to 1994, one of the items specified on an application for a private carrier UHF repeater license would have been the number of mobile units to be authorized. Tr. 974. During the period from October 1992 to some time in 1994, one of the items specified in an application for a conventional SMR 800 MHz repeater license was the number of mobile units to be authorized. Tr. 971, 975. Prior to October 1992, mobile units were not authorized as part of an SMR repeater license, and end users were separately licensed for the number of mobiles required by them. Tr. 975-976. Thus, prior to October 1992, two authorizations were effectively required to legitimize 800 MHz SMR repeater operations--the repeater authorization held by the SMR operator, and the end user license held by the user. Tr. 1890-1899. Sometimes, end user applications were submitted concurrently with the repeater application as part of a package filing; at other times, the repeater application and end user applications were submitted separately at different times. It all depended on the particular configuration and circumstances. Tr. 976.

86. The October 1992 date is significant because 800 MHz end user licensing was eliminated as of that date. In August 1992 the Commission amended its rules and regulations to eliminate separate end user licensing as to 800 MHz SMR stations. Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, Report and Order, PR Docket No. 92-79, 7 FCC Rcd 5558, 71 Rad Reg. 2d (P&F) 166 (1992). The elimination of end-user licensing became effective on October 8, 1992. 57 Fed Reg. 40850 (September 8, 1992). After October 1992 the Commission no longer accepted applications for 800 MHz SMR end user licenses. Tr. 972, 1906.

87. When Kay filed applications specifying a number of mobile units, he was generally projecting anticipated loading for as much as twelve months out, *i.e.*, allowing approximately four months for the coordination and procession of the application plus the eight month construction and "in-operation" deadline applicable at the time. Tr. 976-977. In making these projections, Kay relied on his business judgment, his knowledge of the radio industry, his familiarity with his own business, anticipated sales, anticipated need for additional frequencies to meet customer expansion needs, communications with other radio dealers, conversations with his customers, *etc.* Tr. 977. He was making a "crystal ball" prediction, a forecast, a business estimate of anticipated future needs. Tr. 977-978.

88. Kay's computer-based billing system (from which the data in WTB Exs. 19 and 347 was derived) provides neither a complete nor an accurate accounting of the loading on Kay's system. Kay considers the "loading" on a system to include his own "hard paying" customers (*i.e.*, direct customers who pay Lucky's for repeater service); customers of other radio shops who obtain repeater service through Kay's facilities pursuant to special arrangements between those

shops and Lucky's rental units which Southland charged for rental but which Lucky's did not charge for the repeater service; shop radios and "demo" units on hand for internal and other miscellaneous uses. Tr. 1069, 1087, 1116, 1128-1129. In short, the database reflects mobile units only for accounts for which a bill was generated to send to a customer. Tr. 1153-1154, and even then the billing system database would not accurately reflect many of these units, either currently or historically, for a number of reasons.

89. The database contained no information on any non-current customer who canceled service prior to approximately September 1993--the date the Xenix system was last purged. Tr. 1046, 1087-1088. For customers who are reflected in the database, only their most recent configuration is given. Changes in customer configuration (changes in repeater sites, additions or deletions of units, *etc.*) are not tracked. Tr. 1433. The database was designed solely and exclusively to facilitate billing, not to track loading; it does not accurately reflect loading. Kay often included access to multiple repeater sites as part of a customer's service package, but only billed the customer for one site. For example, a customer might be billed for access to repeaters at Mount Lukens and also given "free" access to repeaters at Sierra Peak, and only Mount Lukens would be reflected in the database. Tr. 1017-1018, 1048-1049. Prior to some time in either late 1993 or early 1994, the customer maintenance screen format did not accommodate a large number of repeater sites without the software causing other problems, and so the so-called "free" sites were not reflected. Tr. 1049, 1106-1107. But whether or not Kay specifically charged for access to a repeater site, if the customers had access to and, in fact, used the site, it was doing so pursuant to Kay's license and was, therefore, properly considered part of the loading on the system. Tr. 1075.

90. The table below shows, in each columns from left to right: (a) the call sign and primary location of each trunked SMR (YX) authorization currently held by Kay; (b) the number of base station repeater channels authorized under the call sign at the primary location;<sup>12</sup> (c) the number of mobiles required to satisfy the 70 mobiles per channel loading criterion;<sup>13</sup> and, (d) the actual number of units reflected in Kay's billing records as of November 1995. As shown, Kay's trunked SMR (YX) systems were fully loaded to well over 70 mobiles per channel.

#### Loading on Kay's Trunked SMR (YX) Systems

<u>Call Sign / Location</u>	<u>Channels</u>	<u>Required</u>	<u>Actual</u>
WNMY402 / Mount Luken	11	1260	2687 <sup>14</sup>

<sup>12</sup> The Bureau has not presented any evidence against Kay under the loading issue as to his trunked system. Likewise, it has not urged an adverse determination under this issue.

<sup>13</sup> The figures in this column were calculated by multiplying the number of authorized base station repeater channels by 70.

<sup>14</sup> WTB Ex. 19 at pp. 148-157.

WNPJ874 / Mount Lukens	7	(combined)	(combined)
WNJA910 / Oat Mountain	17	1190	2028 <sup>15</sup>
WNSK552 / Castro Peak	3	210	785 <sup>16</sup>
WNJL306 / Santiago Peak	9	630	2702 <sup>17</sup>
WNXW327 / Heaps Peak	8	560	743 <sup>18</sup>
WNKV762 / Snow Peak	3	210	453 <sup>19</sup>

91. Kay provided repeater service to end users on a commercial basis acting as a "private carrier" with respect to UHF stations or as an "SMR" with respect to 800 MHz stations. Unlike other Part 90 licenses, commercial service providers experience a constant fluctuation in loading. Customers come and go, customers increase and decrease their mobile counts and otherwise change their configuration, with the result that loading goes up and down over any particular period of time. Tr. 1002, 1116-1117, 1130-1131. Kay kept radios in inventory to be able to respond to these constant changes and fluctuations in customers demand, as well as to be used as loaners, rentals, and demos. The record reflects that Kay maintained an inventory of user radios (both UHF and 800 MHz, both conventional and trunking) from approximately 1,000 to 1,500 units before the January 1994 earthquake and about 600 to 700 units after the earthquake and now. Tr. 2273-2274, 2494-2495; Kay Ex. 48.

92. In addition to repeater service provided directly to users by Lucky's and/or radios sold or rented to users by Southland, Kay has arrangements with more than two dozen other dealers who use Lucky's repeaters for their own internal shop and memo use, to provide service to loaner and rental units and to provide service to their own customers. Tr. 2374-2377. These dealers, at any given time, have an average of 15 to 20 loaners, demos, and rentals active on Kay's repeater system but which would not be reflected in Kay's computer-based billing system. Tr. 2378-2379. Kay identified a substantial number of these dealers by name, specifically confirming his relationship with them currently and prior to January 1994. Tr. 2379-2382. The billing system and hence the data reproduced in WTB Ex. No. 19, reflects no loading on certain stations simply because the service area is overlapped by other stations, the specified facility is one

<sup>15</sup> WTB Ex. 19 at pp. 157-165.

<sup>16</sup> WTB Ex. 19 at pp. 166-169.

<sup>17</sup> WTB Ex. 19 at pp. 179-177.

<sup>18</sup> WTB Ex. 19 at pp. 178-181.

<sup>19</sup> WTB Ex. 19 at pp. 186-187.

licensed under multiple call signs and other similar idiosyncrasies. Tr. 1107-1113. It also did not reflect "talk-around" use, *i.e.*, units that transmit direct, mobile-to-mobile, without going through the repeater itself, but which nonetheless operate under the auspices of the repeater authorization. Tr. 1078, 1082.

93. Most applications submitted by Kay did not require an examination of loading. Kay recalls only a few times when he was actually required to demonstrate loading on his own system. Tr. 1221. Kay explained that he had found legitimate ways to avoid the exercise because it was such a complicated task. It required looking at the entire loading situation on the channel by all licensees. If a channel were already loaded to more than the specified level by other co-channel licensees, the loading on the application that he was proposing did not matter. When Kay did have to look at the loading on his own system, he relied on the totality of his business records (computer system, paper records, *etc.* plus what he knew off the top of his head. Tr. 1221-1226. Another method used by Kay was to "package" repeater applications with the end user applications in such a manner that the question of loading on existing systems of the applicant would be irrelevant because an application "would be granted into a fully loaded environment," Tr. 976, 2342-23243. Indeed, the record contains an example of such a "package" application that was presented by Kay and granted by the Commission. WTB Ex. 311; Tr. 2347-2349.

### **Multiple Applications Issue**

#### **(1) Roy Jensen**

94. Roy Jensen was employed by Southland from the Spring of 1990 to May 1992. Tr. 1463. He became general manager shortly after joining Southland. Tr. 1464. Neither Jensen nor the Southland employees he supervised had any direct duties with regard to Lucky's. Tr. 1465. Jensen and Kay had late dinners together several times a week during which they would, in Jensen's words, "discuss business in general." Tr. 1493.

95. Jensen's "best recollection" is that Kay asked Jensen to sign an application for a land mobile license. Tr. 1484. He believes that WTB Ex. 306 is a copy of that application. Tr. 1486. It is an application for an 800 MHz end user license, FCC File No. 9008511576, seeking authority to operate 37 mobiles. WTB Ex. 306 at p. 1. The applicant is designated as Roy Jensen dba Consolidated Financial Holdings. *Id.* The application was granted by the Commission, and an end user license (Call Sign.WNUG662) was issued, which Jensen received in the mail. WTB Ex. 307; Tr. 1488.

96. Jensen testified that Consolidated Financial Holdings is a business name that he registered some time ago in order to pursue business activities unrelated to his employment at Southland. He does not recall when he took out the name, but it could have been during his first year at Southland, *i.e.*, 1990. He does not recall the nature of the anticipated business project and he states that he never pursued it. Tr. 1478-1479. Jensen denies that Consolidated Financial Holdings ever operated any radios (repeaters or mobiles), Tr. 1485, and he denies that he ever

told Kay he wanted to operate 37 mobiles, Tr. 1488. Jensen does acknowledge having done off-hours surveillance work, together with Southland employee Kevin Hessman, providing mobile radio communications support for the Los Angeles Police Department. Tr. 1521-1523.

97. Kay testified that he assisted Jensen in obtaining the user license so that Jensen could use shop radios outside of his employment with Southland to pursue his own business interests. Kay recalled that Jensen "was always involved in one type of would-be entrepreneurship or another.... He always wanted to have his hand in business in some fashion." Tr. 2520. When Jensen expressed admiration and interest in Kay's SMR activities. Kay explained that Jensen could do that as well, and he assisted Jensen in obtaining the end user license and provided Jensen with free use of shop radios to pursue Jensen's outside business activities. Tr. 2520-2521. There was no written agreement between Jensen and Kay. Tr. 1485, 2521.

98. When asked about the termination of his employment with Southland, Jensen testified that he had been "laid off" in May 1992. Tr. 1507. This was a repeat of a false statement that Jensen had previously made to another government agency. See Kay Ex. No. 1. In a ruling, dated October 7, 1992, Administrative Law Judge Polly Thomas of the Inglewood Office of Appeals of the California Unemployment Insurance Appeals Board, in Case No. ING-63549, concluded that Jensen's "testimony, that he believed after leaving his final meeting with [Kay] that he had been laid off, was not found to be credible." Kay Ex. No. 1 at p. 4. She further found that "when [Jensen] wrote on his application for [unemployment] benefits... that he had been laid off, he knowingly made up false statement to the Department." *Id.* (emphasis added). "Apparently believing that the real reasons for his being out of work would disqualify him for unemployment benefits, [Jensen] attempted to hide the complete circumstances of his discharge from the Department." *Id.* at pp. 4-5 (emphasis added).

(2) Kevin Hessman

99. Kevin Hessman was employed by Southland from May 1990 to October 1993. Tr. 1796-1797. He obtained the job through his friendship with Roy Jensen. Tr. 1796. He did not have any duties relating to Lucky's. Tr. 1797. He was a stock room clerk; he did shipping and receiving and was an "all around go-fer." Tr. 1797, 1292-1293.

100. Kevin Hessman claims that approximately six months after he began working for Southland, he was approached by Kay and Jensen and asked to sign some FCC application forms. Jensen allegedly told him it was to "to help Jim with the business, and everyone else did it." Tr. 1798. He does not recall Kay saying anything in this meeting; he said Jensen did most of the talking. Tr. 1798-1799.

101. WTB Ex. 208 is an 800 MHz end user license (Call Sign WNXV559) issued on July 1, 1992, in the name of Kevin Hessman dba Hessman Security, and authorizing the operation of 73 mobile units on SMRS Station WNYR747. Hessman recalls receiving this license in the mail at his mother's house where he was residing at the time. Tr. 1798. WTB Ex. 309 is an 800 MHz end user license (Call Sign WNNE920) issued on April 29, 1992, in the